

The Age of Internet Defense – ABA Formal Opinion 477R and Its Applicability to Nevada Legal Practice

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In an age where Equifax data breaches and identity theft are commonplace, the internet feels like a modern wild west. The internet is a functionally lawless space where anything can (and does) occur. Given recent public exposure of large quantities of supposedly private data, businesses and organizations have begun to adopt new network security protocols. The law is no different. Where previous ABA ethics opinions freely allowed the use of email and the internet to store sensitive private data, there is new concern about the safety of client information. In May 2017, the ABA responded to these concerns with a new rule: Formal Opinion 447R.

The Background and Findings of ABA Formal Opinion 447R

In 1999, the ABA Standing Committee on Ethics and Professional Responsibility wrote Formal Opinion 99-413. That opinion concluded that attorneys have a reasonable expectation of privacy in email communications and may freely use electronic communications to discuss privileged matters with clients without disturbing attorney ethics requirements. Had technology not rapidly evolved over the last decade and a half, the 1999 rule would likely still govern electronic communications. However, due to the rapid development of new technologies, the ABA's ethics committee wisely decided to author a new opinion.

The perpetual march of technological advancement resulted in a pseudo-obsolescence of the spirit of many ethics rules. While the text of the rules still applied, the ethics situations became different. To account for these recent changes, the ABA altered the model rules in 2012. These "technology amendments" included further instructions in Model Rule 1.6, requiring reasonable protection of client data by preventing inadvertent disclosure. No published opinion has yet undertaken an extensive examination of the effect of these new amendments as they relate to a breach of confidentiality online. Formal Opinion 447R is an attempt to explain the 2012 "technology amendments."

Formal Opinion 447R briefly addresses the duties of competence (Rule 1.1) and communication (Rule 1.4), but the bulk of the opinion focuses on confidentiality (Rule 1.6). The opinion interprets the amendment to Model Rule 1.6 as not providing specific standards, but rather requiring appropriate care on a case-by-case basis. Attorneys should employ more stringent safeguards where the information is sensitive and is likely to be sought by third parties. Attorneys should also consider the cost and difficulty of implementing safeguards as well as the extent to which stringent safeguards could impair effective representation.

Formal Opinion 447R and Nevada Practice

While Nevada has generally adopted the ABA model ethics rules, many rules were either not adopted in full or edited. Rule 1.6, discussing attorney-client confidentiality, is one of those rules; however, for the purposes of protecting non-criminal attorney-client confidences, the Nevada rule and the model rule are identical. See Nev. Rules of Prof'l Conduct R. 1.6 model rule comparison (2014). This includes the 2012 model rules revisions, which makes Formal Opinion 447R relevant in Nevada. *Id.* at (c).

Unfortunately, the only Nevada case interpreting Rule 1.6(c) does not specifically discuss electronic communications. See *In re Toigo*, 385 P.3d 585 (Nev. 2016) (suspending an attorney's law license for leaving confidential client documents in his former home after his eviction). That said, Rule 477R does provide sufficient guidelines for Nevada attorneys to follow.

Electronic communications do need to be sufficiently safeguarded to protect client information. In general, unencrypted email communication is still permissible under the rule (although not always); however, chat rooms and other less secure systems are unadvisable. Attorneys should also do due diligence when purchasing electronic communication services from vendors and ensure the vendor is credentialed, employs secure information safeguarding policies, and has sound hiring practices. Additionally, the opinion encourages attorney-client communication about electronic-security. Where appropriate, attorneys and clients may choose to have a contract regarding an attorney's use of safeguards. In the new technology world, the general rule is that no attorney can be too careful.

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